No. 17-1091

In the

Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2

Petitioners,

v.

STATE OF INDIANA

Respondent.

On Writ of Certiorari to the Indiana Supreme Court

BRIEF OF AMICI CURIAE INDIANA CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONERS

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Statement of Interest[1]

Andrew Ault, Esq., Jeff Cardella, Esq., and Todd Ess, Esq., Amici Curiae, are criminal defense lawyers in Indianapolis, Indiana and frequently represent defendants in criminal proceedings in Indiana state court, claimants in related state civil forfeiture proceedings and, on occasion, family members and co-claimants of defendants. As attorneys whose clients are adversely affected by the Indiana Supreme Court's holding in *State v. Timbs*, 84 N.E.3d 1179 (Ind. 2017), Amici have an interest in ensuring that their clients obtain the protection of the Excessive Fines Clause of the Eighth Amendment.

Mr. Cardella was lead counsel in *Washington v. Marion County Prosecutor*, 1:16-cv-02980-JMS, where District Judge Magnus-Stimson granted class certification and held that the State's forfeiture law violated the Eighth Amendment. *See Washington v. Marion County Prosecutor*, 264 F. Supp. 3d 957 (S.D. Ind. 2017). The Indiana forfeiture law permitted the indefinite retention of property pending a forfeiture trial which the district court found to be unconstitutional. The legislature has since amended the statute and the parties are litigating whether

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than amici or their counsel, make a monetary contribution to the preparation or submission of this brief. The parties have given blanket consent to the filing of amicus briefs.

the U.S. Court of Appeals for the Seventh Circuit should vacate the appeal due to changes to the statute.

Summary of the Argument

Indiana's civil forfeiture law is used for the benefit of the State and not its citizens. Incorporation of the Eighth Amendment's Excessive Fines Clause against the State is essential to the protection of the public against abuses and inequities of forfeiture law, practice and procedure.

Indiana's forfeiture law lacks meaningful innocent owner provisions. Under Indiana law, owners of any property (except vehicles) subject to forfeiture have no right to assert an innocent owner defense. Even the State's application of Indiana's innocent owner provision for vehicles has been construed against claimants.

There are no civil forfeiture jury trials in Indiana. Although the State permits jury trials for infractions such as speeding, the Indiana Supreme Court does not allow jury trials in civil forfeiture proceedings. Civil forfeiture in Indiana is treated as an equitable proceeding that is decided by a judge, not a jury.

Finally, the State's policies, procedures and lack of oversight of forfeiture practices and the substantial proceeds generated have created a "policing for profit" system that operates efficiently for law enforcement but disserves the public. Indiana's Constitution provides that all forfeited funds must be deposited into the Common School Fund and lent to the counties for school construction. State legislation has unabashedldy violated that constitutional mandate. Under Indiana's forfeiture law, law enforcement keeps most of the forfeited funds despite the plain language of the State Constitution which prohibits this practice. Smaller counties in Indiana hire private attorneys to prosecute civil forfeiture actions and Indiana law requires that those attorneys be paid on a contingency basis, creating conflicts of interest and violations of due process. Not long ago, a county hired a part-time salaried assistant district attorney who prosecuted criminal cases for the county and simultaneously handled the related civil forfeiture matters on a contingency fee basis. *See In re McKinney*, 948 N.E.2d 1154, 1157 (Ind. 2011) (imposing 120-day suspension against the respondent attorney).

I. Indiana's Excessive Civil Forfeitures

The question presented is whether the Eighth Amendment's Excessive Fines Clause is incorporated against states under the Fourteenth Amendment. The Court's ruling will immediately impact Tyson Timbs, whose 2012 Land Rover LR2, valued at $42,000, was forfeited because he made a pair of two-gram sales of heroin to an undercover police

officer for $535 in total. The trial court found that the forfeiture was excessive. The Indiana Court of Appeals affirmed but the Indiana Supreme Court reversed on the ground that the trial court erred by even conducting an excessiveness inquiry.

Amici regularly represent people like Mr. Timbs and his family. In our experience, Indiana forfeits property such as automobiles more often than it does homes or businesses. For a State that has applied the automobile exception to the Fourth Amendment sparingly, Indiana's focus on vehicle forfeiture is ironic. The Indiana Supreme Court has declined to apply several warrantless search exceptions to an automobile and in doing so has provided a unique rationale:

> Americans in general love their cars. It is, however, particularly important, in the state which hosts the Indy 500 automobile race, to recognize that cars are sources of pride, status, and identity that transcend their objective attributes. We are extremely hesitant to countenance their casual violation, even by law enforcement officers who are attempting to solve serious crimes.

Brown v. State, 653 N.E.2d 77, 80 (Ind. 1985).

Often the property owner is not the wrongdoer. Our experience is that law enforcement will seize a car involved in a single drug transaction

even if the owner was not in the vehicle at the time the crime occurred. Incorporation of the Excessive Fines Clause is needed to protect innocent family member-owners in those circumstances. Otherwise, they will continue to be short-changed of essential due process in Indiana. Our experience and views as defense lawyers are not unique. Indiana Court of Appeals Judge Barnes acknowledged in this case that he was "keenly aware" of:

> the overreach some law enforcement agencies have exercised in some of these cases. Entire family farms are sometimes forfeited based on one family member's conduct, or exorbitant amounts of money are seized.

Indiana v. Timbs, 62 N.E.3d 472, 478 (Ind. Ct. App. 2016).

One element of an Excessive Fines Clause analysis is whether the forfeiture would destroy a defendant's future livelihood. *See United States v. Viloski*, 814 F.3d 104, 112 (2d Cir. 2016). A number of our clients' vehicles have been forfeited based on the vehicle's involvement in a small number of drug transactions, or sometimes only one transaction. Many times the transaction was conducted by a relative who borrowed the vehicle.

In our experience, the vehicle subject to forfeiture is usually one of the only assets owned by the claimant and his family. Forfeiture can result in the loss of a job, the inability to pick up children at

school or not transporting elderly relatives to medical appointments. The vehicle is not just the client's most significant asset, it is an indispensable part of the client's daily life. *See Krimstock v. Kelly*, 306 F.3d 40, 61 (2d Cir. 2002) ("The particular importance of motor vehicles derives from their use as a mode of transportation and, for some, the means to earn a livelihood. An 'individual has an important interest in the possession of his [or her] motor vehicle,' which is 'often his [or her] most valuable possession.'") (brackets in original); *Coleman v. Watt*, 40 F.3d 255, 260-61 (8th Cir. 1994) ("Automobiles occupy a central place in the lives of most Americans, providing access to jobs, schools, and recreation as well as to the daily necessities of life."); *Stypmann v. City & County of San Francisco*, 557 F.2d 1338, 1342-43 (9th Cir. 1977) ("The private interest in the uninterrupted use of an automobile is substantial. A person's ability to make a living and his access to both the necessities and amenities of life may depend upon the availability of an automobile when needed.").

The Indiana Supreme Court's decision in this case has a substantial and harmful impact on our clients who should have the right to challenge a forfeiture as unconstitutionally excessive.

II. Incorporation of the Eighth Amendment is Necessary Because Indiana's Civil Forfeiture Statute Lacks Any Significant Protections for Property Owners.

Indiana does not protect the rights of forfeiture claimants. Incorporation of the Eighth

Amendment's Excessive Fines Clause is necessary in order to accord safeguards for property owners.

This Court's incorporation decision will provide much needed guidance to the lower courts and the Indiana legislature. Determining that states are bound by the Eighth Amendment's Excessive Fines Clause will reduce the fundamental unfairness of civil forfeiture as currently practiced and promote the public's respect for the rule of law.

1. Indiana Does Not Protect "Innocent Owners."

Indiana's forfeiture law applies to all types of property, including currency, vehicles, real and personal property. Ind. Code § 34-24-1-1. The statute reaches criminal proceeds and instrumentalities of crimes. The statute reaches all vehicles that are "used or [] intended for use . . . to transport or in any manner to facilitate the transportation of" various schedule I, II, III, IV and V controlled substances. Ind. Code § 34-24-1-1(a)(1). The Code authorizes the forfeiture of "[r]eal property owned by a person who uses it to commit any" of a long list of enumerated felonies including dealing in schedule I, II, III, and IV controlled substances. Section 34-24-1-1(d) creates a statutory presumption that money found near a person engaged in drug transactions is *prima facie* subject to forfeiture:

> money found on or near a person who is committing, attempting to commit, or conspires to commit any of the specifically enumerated

> offenses, is presumed forfeitable – period.

Caudill v. State, 613 N.E.2d 433, 438 (Ind. Ct. App. 1993).

Section 34-24-1-1 is draconian and not countered by any meaningful protection for innocent owners, co-owners and family members, all of whom share a financial stake, ownership and/or control over the property, and face an uphill battle to protect their rights. Indiana's innocent owner provision applies only to forfeitures of vehicles. The sole provision on burden of proof for innocent ownership provides:

> At the hearing, the prosecuting attorney must show by a preponderance of the evidence that the property was within the definition of property subject to seizure under section 1 [IC 34-24-1-1] of this chapter. If the property seized was a vehicle, the prosecuting attorney must also show by a preponderance of the evidence that a person who has an ownership interest of record in the bureau of motor vehicles knew or had reason to know that the vehicle was being used in the commission of the offense.

Ind. Code § 34-24-1-4(a) (emphasis added).[2]

Vehicle owners have the opportunity to assert an innocent owner defense. Owners of real property and currency do not. Judge Barnes, in his dissenting opinion, observed that "Entire family farms are sometimes forfeited based on one family member's conduct, or exorbitant amounts of money are seized." *Timbs*, 62 N.E.3d at 478. Yet, these family members have no ability to challenge the forfeiture in Indiana as innocent owners. Given that real estate is commonly held jointly by family members, innocent owners in Indiana are defenseless and can lose their property to the State. This contrasts sharply with federal forfeiture where courts apply an excessive fines analysis and prohibit the forfeiture of real estate simply due to one family member's criminal activity. *United States v. von Hofe*, 492 F.3d 175, 184 (2d Cir. 2007) (forfeiture of wife's interest in the family home based on husband's marijuana operation was unconstitutional under the Eighth Amendment). *See also United States v. Ferro*, 681 F.3d 1105 (9th Cir. 2012) (rejecting forfeiture of antique gun collection on Eighth Amendment grounds).

The statute provides that after the State forfeits co-owned property, the innocent co-owner can redeem the property by paying the State the value of the wrongdoer's interest. Ind. Code § 34-24-1-5. If the co-owner can make this payment, she/he

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[2] There is a separate innocent owner provision for forfeiture of vehicles involved in DWI offenses. § 34-24-1-1(e).

can recover the property free and clear. This provision only applies to owners who did not know about the criminal conduct.

This Court has struggled with the rights of innocent owners and has affirmed forfeitures of their property. *Van Oster v. Kansas*, 272 U.S. 465 (1926) (forfeiture of co-owned vehicle); *Dobbins's Distillery v. United States*, 96 U.S. 395, 401 (1878) (forfeiture of real estate used improperly by lessee). More recently, in *Bennis v. Michigan*, 516 U.S. 442 (1996), the Court confronted forfeitures more akin to the types Amici observe, namely adjudicating a claim filed by a family member at risk of losing property because of a loved one's crimes. In *Bennis*, the claimant's vehicle was forfeited under Michigan's nuisance law because the claimant's husband used the car to solicit a prostitute and engaged in sex inside of the vehicle. There was no dispute that the husband was not authorized to use the vehicle for this purpose and no evidence existed that the claimant knew or should have known of his conduct. The Michigan Supreme Court nevertheless upheld the forfeiture and this Court affirmed. Chief Justice Rehnquist recognized the absence of fundamental unfairness in that case:

> At bottom, petitioner's claims depend on an argument that the Michigan forfeiture statute is unfair because it relieves prosecutors from the burden of separating co-owners who are complicit in the wrongful use of property from innocent co-owners.

> This argument, in the abstract, has considerable appeal . . . Its force is reduced in the instant case, however, by the Michigan Supreme Court's confirmation of the trial court's remedial discretion . . . and petitioner's recognition that Michigan may forfeit her and her husband's car whether or not she is entitled to an offset for her interest in it...

Id. at 453. Justice Thomas wrote a concurring opinion, joined by Justice Ginsburg, which identified the randomness of the risks to the innocent owner that are posed by forfeiture laws:

> The limits on <u>what</u> property can be forfeited as a result of what wrongdoing -- for example, what it means to "use" property in crime for purposes of forfeiture law -- are not clear to me...Those limits, whatever they may be, become especially significant when they are the sole restrictions on the state's ability to take property from those it merely suspects, or does not even suspect, of colluding in crime.
>
> . . .
>
> Improperly used, forfeiture could become more like a roulette wheel employed to raise revenue from

> innocent but hapless owners whose property is unforeseeably misused, or a tool wielded to punish those who associate with criminals, than a component of a system of justice. When the property sought to be forfeited has been entrusted by its owner to one who uses it for crime, however, the Constitution apparently assigns to the States and to the political branches of the Federal Government the primary responsibility for avoiding that result.

Id. at 455 & 456-457 (citation omitted) (emphasis in original).

Indiana affords no protection for innocent owners of real property and minimal protections for innocent owners of vehicles. A meaningful opportunity to mitigate harm to innocent owners should be a necessary element of any forfeiture proceeding. Permitting claimants to raise a defense under the Eighth Amendment's Excessive Fines Clause is particularly important in Indiana which denies an innocent owner so many other basic legal protections.

2. Indiana Does Not Permit Jury Trials for Civil Forfeiture

Indiana denies claimants the right to a jury trial. Amici are not asking this Court to decide

whether this core right should be incorporated. Amici simply wish to inform the Court that this fundamental right is not available to claimants in Indiana, unlike in the vast majority of states.

"The right to have a jury make the ultimate determination of guilt has an impressive pedigree." *United States v. Gaudin*, 515 U.S. 506, 510 (1995). It dates back centuries:

> The history of trial by jury in criminal cases has been frequently told. It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta. Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689.

Duncan v. Louisiana, 391 U.S. 145, 151 (1968) (footnotes omitted). While this Court has held that forfeiture is punitive, *United States v. Bajakajian*, 524 U.S. 321, 334 (1998), it retains a civil character. A claimant has the right under the Seventh Amendment to a jury trial in a civil forfeiture proceeding. *United States v. One 1976 Mercedes*

Benz, 618 F.2d 453, 454-469 (7th Cir. 1980). The court of appeals in *One 1976 Mercedes Benz* focused on the dichotomy between forfeitures under maritime law and those brought "on land" where jury trials were always permitted and traced the right to a jury trial in civil forfeiture back to 1791, commenting that "[i]t is difficult to imagine how a proceeding to enforce a statutory forfeiture can resemble in any respect a suit in equity." *Id.*, 458-459. The court noted that this proposition was first articulated by Justice Marshal (*id.* (quoting *The Sarah*, 21 U.S. (8 Wheat.) 391, 394, 5 L. Ed. 644 (1823))), and that the right remained enshrined in the law, citing *Rogers v. Loether*, 467 F.2d 1110, 1123 n. 44 (7th Cir. 1972) (Stevens, J.) ("Except in admiralty, forfeiture cases are triable to a jury."), *aff'd sub nom, Curtis v. Loether*, 415 U.S. 189 (1974).

This historical trend clashes with Hoosier jurisprudence. The Seventh Amendment right to a jury trial is not incorporated into the Bill of Rights. *McDonald v. City of Chicago*, 561 U.S. 742, 765 n.13 (2010). Absent a state constitutional provision, legislation by the Indiana legislature, or a decision by the Indiana courts, Hoosiers do not have a right to a jury trial. The Indiana Bill of Rights which grants trials by jury has not been extended to forfeiture. *See* Ind. Constitution, Article I, Section 20. The Indiana Supreme Court held more than a 100 years ago that there is no right to a jury because forfeiture is a statutory proceeding. *Campbell v. State*, 87 N.E. 212, 215 (1909).

The Indiana Court of Appeals revisited the issue 90 years later:

> [W]e think that the forfeiture of vehicles, money, personal assets, and other property serves remedial, non-punitive purposes. One is creating an economic disincentive to engage in proscribed behavior by subjecting to forfeiture those items "traceable" to criminal activity. By denying individuals the ability to profit from ill-gotten gain, an action for forfeiture resembles an equitable action for disgourgement [sic] or restitution. In addition, by allowing law enforcement officials to recoup the cost of drug operations from the proceeds of forfeited items, the statute helps to finance the State's legitimate interest in enforcing its anti-drug-trafficking laws. Given these remedial purposes, we do not think that the sometimes harsh effects of I.C. 34-4-30.1 override our conclusion that the General Assembly intended this as a civil action.

Caudill v State, 613 N.E.2d 433, 437 (Ind. Ct. App. 1993).

The right to a jury trial is a common protection for property owners in other states but not in Indiana. Indiana extends the right to a jury trial to nearly all other actions brought by the State.

See, e.g., Schumm v. State, 886 N.E.2d 781, 786-90 (Ind. Ct. App. 2007) (reversing judgment on a *Batson* challenge in a case involving a traffic infraction citation for operating a vehicle with improper tail lights).

III. Indiana's "Policing for Profit" Violates the Due Process Clause.

Where a law enforcement agency's priorities and actions are influenced, if not driven, by the revenue that it expects to receive from forfeitures, there is a substantial likelihood that the entire forfeiture program violates the Fourteenth Amendment's Due Process Clause. This Court has provided guidance on when a prosecutor or his office has a financial interest in the outcome of a penalty-based proceeding. In *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 250 (1980), the Court rejected a claim that the Due Process Clause was violated where 1% of an agency's budget consisted of funds collected from its civil enforcement actions. However, the Court cautioned:

> A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.

Id. at 250. "Policing for profit" occurs when police and prosecutors select cases based on the opportunity to supplement their budgets. Indiana's forfeiture laws have created a program of policing for profit and incorporating the Eighth Amendment's Excessive Fines Clause will help mitigate or eliminate the ill effects of this system.

1. Local Law Enforcement Regularly Violates Its Duties under the Indiana State Constitution

In 1851, the State held a constitutional convention which amended the State Constitution to create a Common School Fund. The relevant provision states:

> Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.

Ind. Constitution, Article 8, Section 1.

The State Constitution directs that financing for education will be provided by the Common School Fund, which in turn would be funded by several sources including "the fines assessed for breaches of the penal laws of the State; and from all forfeitures which may accrue." Ind. Constitution, Art. 8, § 2; *see also* Ind. Code § 20-42-1-3 ("Sources of Funds"). The Common School Fund operates as an endowment for the permanent financing of public education in Indiana:

> The principal of the Common School fund shall remain a perpetual fund, which may be increased, but shall never be diminished; and the income thereof shall be inviolably appropriated to the support of Common Schools, and to no other purpose whatever.

Ind. Const. Art. 8, § 3 (emphasis added). The fund lends money at favorable interest rates to municipalities for education-related construction projects.

Although the State Constitution provides that all forfeited funds must be deposited into the Common School Fund, the Indiana legislature has ignored this mandate by permitting law enforcement agencies to fund their operations with money raised from the sale of forfeited assets. The Indiana Supreme Court has stated in *dicta* that this process may be unconstitutional. *Serrano v. State*, 946 N.E.2d 1139, 1146 n.3 (2011). That court is

revisiting the issue this year in *Horner v Curry*, 2018 Ind. LEXIS 472 (order transferring jurisdiction, dated June 19, 2018, and denying request for expedited appeal).

Historically, state law enforcement agencies have been permitted to recoup their costs from forfeited assets. Ind. Code § 34-24-1-4(d) (2017). News media reports have claimed that state law enforcement has circumvented the Common School Fund mandate by claiming that the forfeiture proceeds were less than their costs. In 2011, the *Indianapolis Star* reported that "many of the state's 92 counties, including Marion, have been hoarding all of their forfeiture money for years, never sending any to the school fund."[3] The *Indianapolis Star* reported that only:

> five [out of 92] counties submitted any forfeiture money to the Common School Fund from Jan. 1, 2008, to Feb. 25, 2010, according to records provided by the state treasurer's office. The grand total: $99,490.

Id. (bracketed materials added). In 2015, the *Indianapolis Star* reported that Marion County, home to Indianapolis, the largest city in Indiana, kept all forfeited funds for itself and did not deposit

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[3] "Lawmaker wades into forfeiture fight," *The Indianapolis Star*, Jan. 10, 2011 Final Edition.

any funds into the Common School Fund.[4] The article also reported that these funds were used to pay law enforcement costs.

At a 2017 Indiana legislative hearing on forfeiture reform, one local prosecutor admitted to policing for profit:

> I'm not going to hire anybody to do forfeitures to collect money for the State of Indiana. If my office isn't getting money, I'm not going to be able to pay them for that, and—why am I going to do the extra work and not have some benefit that comes out of it?[5]

At another hearing in 2017, the prosecuting attorney for Delaware County acknowledged that forfeiture helps fund law enforcement without raising taxes.[6]

By statute, § 34-24-1-4.5, a prosecuting attorney is required to report on the results of

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[4] "Seized assets," *The Indianapolis Star*, February 22, 2015.

[5] Hrg. of Ind. Senate Corrs. & Crim. Law Comm. (Jan. 10, 2017) (video statement of Rodney J. Cummings, Prosecuting Attorney for Madison County), at 2:27:11–2:27:23, https://tinyurl.com/y9hnzrto.

[6] Hrg. of Ind. Senate Corrs. & Crim. Law Comm., Interim Study Committee (Aug. 16, 2017) (video statement of Jeff Arnold), Prosecuting Attorney for Delaware County), at 23:30:-24:48, http://iga.in.gov/information/archives/2017/video/committee_i_courts_and_the_judiciary_interim_study_committee_on/

forfeiture cases. The statistics in reports for the last two years indicate that only a tiny fraction of forfeiture proceeds is transferred to the Common School Fund:

	Forfeited Cash & Auction Proceeds	Payments to Common School Fund
2016[7]	$1,802,941.44	$31,443.12
2017[8]	$3,394,266.28	$62,952.71

Earlier this year, the legislature enacted Senate Enrolled Act 99 ("SEA 99"), which slightly changed the allocation structure. Previously, municipalities were permitted to determine their costs. Now, municipalities are permitted by law to keep the bulk of the forfeited property.

Section 3 of SEA 99, codified at Ind. Code § 34-24-1-8(d)(3), provides that, after paying a contingency fee to a private attorney, the prosecuting county keeps one-third of the forfeiture to cover its costs. *Id.* Of the remaining funds, 85% is paid to the general fund of the jurisdiction which handled the prosecution. *Id.*

Despite the plain language of the State Constitution, State law still permits law enforcement to keep the bulk of the forfeited

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[7] https://iga.in.gov/legislative/2017/publications/agency/reports/ipac/

[8] https://iga.in.gov/legislative/2017/publications/agency/reports/ipac/#document-c5e83dff

proceeds. As noted above, the Indiana Supreme Court will soon decide if the statute violates Indiana's Constitution.

2. Indiana Has Privatized Civil Forfeiture

The prosecutor's role in forfeiture has been privatized. Many smaller municipalities retain private lawyers to prosecute forfeiture cases on a contingency fee basis. Thus, the prosecuting attorney has a personal financial interest in the outcome of the litigation, thereby bringing "irrelevant or impermissible factors" into the forfeiture. *Marshall*, 446 U.S. at 250.

The most notorious example of prosecuting for forfeiture dollars involved Mark McKinney, a deputy prosecuting attorney in Delaware County whose seat is Muncie. McKinney simultaneously represented the State in the criminal proceedings as a part-time paid employee and prosecuted the civil forfeiture as a part-time contractor on a contingency fee basis:

> Respondent at times engaged in plea agreement negotiations regarding criminal cases with criminal defendants before and/or after Respondent also engaged in ... settlement negotiations regarding related civil forfeiture actions with the same criminal defendants. Respondent did this knowing that he would receive payment as personal

> compensation equaling 25% of the amount transferred as a result of the action.

In re McKinney, 948 N.E.2d 1154, 1157 (2011). The Indiana Supreme Court imposed a 120-day suspension against McKinney.

Earlier this year, the Indiana Legislature enacted the aforementioned forfeiture reform, SEA 99. Section 5 of SEA 99, codified at Ind. Code § 34-24-1-8, makes it mandatory that, if a county retains a private attorney, the county must pay the attorney on a contingency fee basis.[9] The rates of the fee agreement are set forth in the statute which provides a minimum fee of $100 per case and a contingency recovery as follows: one-third of the first $10,000 recovery; 20% of the portion of any recovery that exceeds $10,000 but is less than $100,000, and 15% of any recovery over $100,000. *See* Ind. Code § 34-24-1-8(d). The court may permit the private attorney to seek additional fees over the amounts set by statute. Ind. Code § 34-24-1-8(e).

Between contingency payments to contract lawyers and statutory costs paid to local law enforcement agencies, the Common School Fund keeps about 8% of a $100,000 forfeiture. This statutory amendment is not consistent with

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[9] The statute further provides that publicly-paid prosecutors cannot receive a contingency fee for private forfeiture work. § 34-24-1-8(d). Thus, conflicts like those that occurred in the cases that McKinney handled will not reoccur.

Indiana's State Constitution which mandates that these funds be used to fund public education.

Moreover, the contingency fee structure incentivizes private attorneys to bring lots of small cases. Private lawyers have little incentive to bring larger, more complex forfeitures which can be time consuming; their percentages diminishes as the amount of the recovery increases. In contrast, forfeiture of vehicles tend to be straightforward and more profitable under the statute.

Given that the State keeps nearly all of the forfeited assets to fund its law enforcement budgets and given that private lawyers are improperly incentivized to behave like bounty hunters, Amici urge this Court to hold that the Eighth Amendment's Excessive Fines Clause is incorporated into the Fourteenth Amendment.

CONCLUSION

Indiana's unfair and harsh civil forfeiture scheme suffers from systematic problems including due process deficiencies that strip Hoosiers of time-honored rights. Now, more than ever, Hoosiers need relief from these harsh, profit-driven practices and request protection under the Eighth Amendment to the U.S. Constitution. Amici urge this Court to speak clearly on the invidious effects of forfeiture and overturn the decision of the Indiana Supreme Court. A clear pronouncement on the incorporation of this important right through the Fourteenth Amendment to be free of excessive punishment

will help guide lower courts and the Indiana Legislature.

Respectfully Submitted,

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No. 17-1091

In the

Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2

Petitioners,

v.

STATE OF INDIANA

Respondent.

On Writ of Certiorari
to the Indiana Supreme Court

APPENDIX TO BRIEF OF AMICI CURIAE INDIANA CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONERS

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Appendix A: Ind. Code § 34-24-1 *et seq.*
Current through the end of the Special Session of the 120th General Assembly.

34-24-1-1. Property which may be seized.

(a) The following may be seized:
(1) All vehicles (as defined by Ind. Code § 35-31.5-2-346), if they are used or are intended for use by the person or persons in possession of them to transport or in any manner to facilitate the transportation of the following:
(A)A controlled substance for the purpose of committing, attempting to commit, or conspiring to commit any of the following:
(i) Dealing in or manufacturing cocaine or a narcotic drug (Ind. Code § 35-48-4-1).
(ii) Dealing in methamphetamine (Ind. Code § 35-48-4-1.1).
(iii) Manufacturing methamphetamine (Ind. Code § 35-48-4 1.2).
(iv) Dealing in a schedule I, II, or III controlled substance (Ind. Code § 35-48-4-2).
(v) Dealing in a schedule IV controlled substance (Ind. Code § 35-48-4-3).
(vi) Dealing in a schedule V controlled substance (Ind. Code § 35-48-4-4).
(vii) Dealing in a counterfeit substance (Ind. Code § 35-48-4 5).
(viii) Possession of cocaine or a narcotic drug (Ind. Code § 35-48-4-6).
(ix) Possession of methamphetamine (Ind. Code § 35-48-4 6.1).
(x) Dealing in paraphernalia (Ind. Code § 35-48-4-8.5).

(xi)Dealing in marijuana, hash oil, hashish, or salvia (Ind. Code § 35-48-4-10).

(xii)Dealing in a synthetic drug or synthetic drug lookalike substance (Ind. Code § 35-48-4-10.5, or Ind. Code § 35-48-4-10 before its amendment in 2013).

(B)Any stolen (Ind. Code § 35-43-4-2) or converted property (Ind. Code § 35-43-4-3) if the retail or repurchase value of that property is one hundred dollars ($100) or more.

(C)Any hazardous waste in violation of Ind. Code § 13-30-10-1.5.

(D)A bomb (as defined in Ind. Code § 35-31.5-2-31) or weapon of mass destruction (as defined in Ind. Code § 35-31.5-2-354) used to commit, used in an attempt to commit, or used in a conspiracy to commit an offense under Ind. Code § 35-47 as part of or in furtherance of an act of terrorism (as defined by Ind. Code § 35-31.5-2-329).

(2)All money, negotiable instruments, securities, weapons, communications devices, or any property used to commit, used in an attempt to commit, or used in a conspiracy to commit an offense under Ind. Code § 35-47 as part of or in furtherance of an act of terrorism or commonly used as consideration for a violation of Ind. Code § 35-48-4 (other than items subject to forfeiture under Ind. Code § 16-42-20-5 or Ind. Code § 16-6-8.5-5.1, before its repeal):

(A)furnished or intended to be furnished by any person in exchange for an act that is in violation of a criminal statute;

(B)used to facilitate any violation of a criminal statute; or

(C)traceable as proceeds of the violation of a criminal statute.

(3)Any portion of real or personal property purchased with money that is traceable as a proceed of a violation of a criminal statute.

(4)A vehicle that is used by a person to:

(A)commit, attempt to commit, or conspire to commit;

(B)facilitate the commission of; or

(C)escape from the commission of; murder (Ind. Code § 35-42-1-1), dealing in a controlled substance resulting in death (Ind. Code § 35-42-1-1.5), kidnapping (Ind. Code § 35-42-3-2), criminal confinement (Ind. Code § 35-42-3-3), rape (Ind. Code § 35-42-4-1), child molesting (Ind. Code § 35-42-4-3), or child exploitation (Ind. Code § 35-42-4-4), or an offense under Ind. Code § 35-47 as part of or in furtherance of an act of terrorism.

(5)Real property owned by a person who uses it to commit any of the following as a Level 1, Level 2, Level 3, Level 4, or Level 5 felony:

(A)Dealing in or manufacturing cocaine or a narcotic drug (Ind. Code § 35-48-4-1).

(B)Dealing in methamphetamine (Ind. Code § 35-48-4-1.1).

(C)Manufacturing methamphetamine (Ind. Code § 35-48-4-1.2).

(D)Dealing in a schedule I, II, or III controlled substance (Ind. Code § 35-48-4-2).

(E)Dealing in a schedule IV controlled substance (Ind. Code § 35-48-4-3).

(F)Dealing in marijuana, hash oil, hashish, or salvia (Ind. Code § 35-48-4-10).

(G) Dealing in a synthetic drug or synthetic drug lookalike substance (Ind. Code § 35-48-4-10.5, or Ind. Code § 35-48-4-10 before its amendment in 2013).

(H) Dealing in a controlled substance resulting in death (Ind. Code § 35-42-1-1.5).

(6) Equipment and recordings used by a person to commit fraud under Ind. Code § 35-43-5- 4(10).

(7) Recordings sold, rented, transported, or possessed by a person in violation of Ind. Code § 24- 4-10.

(8) Property (as defined by Ind. Code § 35-31.5-2-253) or an enterprise (as defined by Ind. Code § 35-45- 6-1) that is the object of a corrupt business influence violation (Ind. Code § 35-45-6-2).

(9) Unlawful telecommunications devices (as defined in Ind. Code § 35-45-13-6) and plans, instructions, or publications used to commit an offense under Ind. Code § 35-45-13.

(10) Any equipment, including computer equipment and cellular telephones, used for or intended for use in preparing, photographing, recording, videotaping, digitizing, printing, copying, or disseminating matter in violation of Ind. Code § 35-42-4.

(11) Destructive devices used, possessed, transported, or sold in violation of Ind. Code § 35-47.5.

(12) Tobacco products that are sold in violation of Ind. Code § 24-3-5, tobacco products that a person attempts to sell in violation of Ind. Code § 24-3-5, and other personal property owned and used by a person to facilitate a violation of Ind. Code § 24-3-5.

(13) Property used by a person to commit counterfeiting or forgery in violation of Ind. Code § 35-43-5-2.

(14) After December 31, 2005, if a person is convicted of an offense specified in Ind. Code § 25-26-14-26(b) or Ind. Code § 35-43-10, the following real or personal property:

(A) Property used or intended to be used to commit, facilitate, or promote the commission of the offense.

(B) Property constituting, derived from, or traceable to the gross proceeds that the person obtained directly or indirectly as a result of the offense.

(15) Except as provided in subsection (e), a vehicle used by a person who operates the vehicle:

(A)while intoxicated, in violation of Ind. Code § 9-30-5-1 through Ind. Code § 9-30-5-5, if in the previous five (5) years the person has two (2) or more prior unrelated convictions:

(i)for operating a motor vehicle while intoxicated in violation of Ind. Code § 9-30-5-1 through Ind. Code § 9-30-5-5; or

(ii)for an offense that is substantially similar to Ind. Code § 9-30-5-1 through Ind. Code § 9-30-5-5

in another jurisdiction; or

(B)on a highway while the person's driving privileges are suspended in violation of Ind. Code § 9-24-19-2 through Ind. Code § 9-24-19-3, if in the previous five (5) years the person has two (2) or more prior unrelated convictions:

(i)for operating a vehicle while intoxicated in violation of Ind. Code § 9-30-5-1 through Ind. Code § 9-30-5-5; or

(ii)for an offense that is substantially similar to Ind. Code § 9-30-5-1 through Ind. Code § 9-30-5-5 in another jurisdiction. If a court orders the seizure of a vehicle under this subdivision, the court shall transmit an order to the bureau of motor vehicles recommending that the bureau not permit a vehicle to be registered in the name of the person whose vehicle was seized until the person possesses a current driving license (as defined in Ind. Code § 9-13-2-41).

(16)The following real or personal property:

(A)Property used or intended to be used to commit, facilitate, or promote the commission of an offense specified in Ind. Code § 23-14-48-9, Ind. Code § 30-2-9-7(b), Ind. Code § 30-2-10-9(b), or Ind. Code § 30-2-13-38(f).

(B)Property constituting, derived from, or traceable to the gross proceeds that a person obtains directly or indirectly as a result of an offense specified in Ind. Code § 23-14-48-9, Ind. Code § 30-2-9-7(b), Ind. Code § 30-2-10-9(b), or Ind. Code § 30-2-13-38(f).

(17)An automated sales suppression device (as defined in Ind. Code § 35-43-5-4.6(a)(1) or phantom-ware (as defined in Ind. Code § 35-43-5-4.6(a)(3)).

(18)Real or personal property, including a vehicle, that is used by a person to:

(A)commit, attempt to commit, or conspire to commit;

(B)facilitate the commission of; or

(C)escape from the commission of; a violation of Ind. Code § 35-42-3.5-1 through Ind. Code § 35-

42-3.5-1.4 (human trafficking) or Ind. Code § 35-45-4-4 (promoting prostitution).

(b)A vehicle used by any person as a common or contract carrier in the transaction of business as a common or contract carrier is not subject to seizure under this section, unless it can be proven by a preponderance of the evidence that the owner of the vehicle knowingly permitted the vehicle to be used to engage in conduct that subjects it to seizure under subsection (a).

(c) Equipment under subsection (a)(10) may not be seized unless it can be proven by a preponderance of the evidence that the owner of the equipment knowingly permitted the equipment to be used to engage in conduct that subjects it to seizure under subsection (a)(10).

(d) Money, negotiable instruments, securities, weapons, communications devices, or any property commonly used as consideration for a violation of Ind. Code § 35-48-4 found near or on a person who is committing, attempting to commit, or conspiring to commit any of the following offenses shall be admitted into evidence in an action under this chapter as prima facie evidence that the money, negotiable instrument, security, or other thing of value is property that has been used or was to have been used to facilitate the violation of a criminal statute or is the proceeds of the violation of a criminal statute:

(1) Ind. Code § 35-42-1-1.5 (dealing in a controlled substance resulting in death).

(2) Ind. Code § 35-48-4-1 (dealing in or manufacturing cocaine or a narcotic drug).

(3) Ind. Code § 35-48-4-1.1 (dealing in methamphetamine).

(4) Ind. Code § 35-48-4-1.2 (manufacturing methamphetamine).
(5) Ind. Code § 35-48-4-2 (dealing in a schedule I, II, or III controlled substance).
(6) Ind. Code § 35-48-4-3 (dealing in a schedule IV controlled substance).
(7) Ind. Code § 35-48-4-4 (dealing in a schedule V controlled substance) as a Level 4 felony.
(8) Ind. Code § 35-48-4-6 (possession of cocaine or a narcotic drug) as a Level 3, Level 4, or Level 5 felony.
(9) Ind. Code § 35-48-4-6.1 (possession of methamphetamine) as a Level 3, Level 4, or Level 5 felony.
(10) Ind. Code § 35-48-4-10 (dealing in marijuana, hash oil, hashish, or salvia) as a Level 5 felony.
(11) Ind. Code § 35-48-4-10.5 (dealing in a synthetic drug or synthetic drug lookalike substance) as a Level 5 felony or Level 6 felony (or as a Class C felony or Class D felony under Ind. Code § 35-48-4-10 before its amendment in 2013).

(e)A vehicle operated by a person who is not:
(1)an owner of the vehicle; or
(2)the spouse of the person who owns the vehicle;
is not subject to seizure under subsection (a)(15) unless it can be proven by a preponderance of the evidence that the owner of the vehicle knowingly permitted the vehicle to be used to engage in conduct that subjects it to seizure under subsection (a)(15).

34-24-1-2. Procedure upon seizure.

(a) Property may be seized under this chapter by a law enforcement officer only if:

(1)the seizure is incident to a lawful:

(A)arrest;

(B)search; or

(C)administrative inspection;

(2)the property has been the subject of a prior judgment in favor of the state or unit in a proceeding under this chapter (or Ind. Code § 34-4-30.1 before its repeal); or

(3)a court, after making an ex parte determination that there is probable cause to believe the property is subject to seizure under this chapter, issues an order for seizure.

(b) If property is seized under subsection (a)(1), the prosecuting attorney shall file an affidavit of probable cause with a circuit or superior court in the county in which the seizure occurred not later than seven (7) days after the date of the seizure. If the court does not find probable cause to believe the property is subject to seizure under this chapter, it shall order the property returned to the owner of record.

(c) When property is seized under subsection (a), the law enforcement agency making the seizure may, pending final disposition:

(1)place the property under seal;

(2)remove the property to a place designated by the court; or

(3)require another agency authorized by law to take custody of the property and remove it to an appropriate location.

(d)If property seized under subsection (a)(1) or (a)(3) is real property or a vehicle operated or possessed at the time of its seizure by a person who is not an owner of the real property or vehicle, the owner of the real property or vehicle may file a verified petition for provisional release pending final forfeiture determination, requesting the court to grant the owner possession of the real property or vehicle while the forfeiture action is pending.

(e)A petition for provisional release under this section must:

(1)be in writing;

(2)be verified by the petitioner;

(3)state the grounds for relief;

(4)be filed in a circuit or superior court in the county in which the seizure occurred; and

(5)be served on the prosecuting attorney.

(f)At the hearing on the petition for provisional release under this section, the petitioner must establish that the:

(1)petitioner is an owner of record;

(2)petitioner or the petitioner's family benefits from the use of the vehicle or the real property;

(3)petitioner has insured the property against loss from accident and casualty; and

(4)petitioner had no reason to believe that the vehicle or real property would be used for illegal activity.

(g)At the hearing on the petition for provisional release under this section, the prosecuting attorney may present evidence that returning the property to the owner would likely result in:

(1)damage to the property or diminution of the value of the property beyond ordinary wear and tear; or

(2)continued use of the property in connection with illegal activity.

(h)If the court grants the petition for provisional release under this section, the court shall require the owner to:

(1)maintain the property; and

(2)refrain from selling or otherwise conveying the property without the permission of the prosecuting attorney.

(i)If the court grants the petition for provisional release under this section, it may place reasonable restrictions on the use of the property, including one (1) or more of the following:

(1)Requiring the owner to post a cash bond.

(2)Placing mileage limitations on the use of a vehicle.

(3)Imposing reasonable limits on the use of the property.

(4)Prohibiting certain persons from the possession, occupation, or use of the property.

(5)Requiring payment of all taxes, registration, and other fees, if applicable.

(6)Maintaining property, casualty, and accident insurance.

(j)A court may not grant a petition for provisional release under this section if the prosecuting attorney has filed a motion under section 9 [Ind. Code § 34-24-1-9] of this chapter or Ind. Code § 35-33-5-5(j).

(k)The prosecuting attorney shall notify the owner of record of a vehicle or real property of the right to file a petition for provisional release under this section not later than seven (7) days after probable cause has been determined under subsection (b).

(l)Property that is seized under subsection (a) (or Ind. Code § 34-4-30.1-2(a) before its repeal) is not

subject to replevin but is considered to be in the custody of the law enforcement agency making the seizure.

34-24-1-3. Demand for return — Recovery of law enforcement costs.

(a) The prosecuting attorney for the county in which the seizure occurs may, within twenty-one (21) days after receiving written notice from the owner demanding return of the seized property or within ninety (90) days after the property is seized, whichever occurs first, cause an action for forfeiture to be brought by filing a complaint in the circuit or superior court in the jurisdiction where the seizure occurred. The action must be brought:

(1)in the name of the state; and

(2)within the period that a prosecution may be commenced under Ind. Code § 35-41-4-2 for the offense that is the basis for the seizure.

(b) If the property seized was a vehicle or real property, the prosecuting attorney shall serve, under the Indiana Rules of Trial Procedure, a copy of the complaint upon each person whose right, title, or interest is of record in the bureau of motor vehicles, in the county recorder's office, or other office authorized to receive or record vehicle or real property ownership interests.

(c) If, after the expiration of the twenty-one (21) or ninety (90) day period described in subsection (a), the prosecuting attorney has not filed a complaint initiating an action for forfeiture, the property shall be returned immediately to the owner, or to a lienholder or bona fide purchaser for value. If the property is returned without a complaint for forfeiture having been filed, the owner, lienholder, or bona fide purchaser for value is not liable for any costs or fees incurred in storing, transporting, or maintaining the property.

(d) The owner of the seized property, or any person whose right, title, or interest is of record may, within twenty (20) days after service of the complaint under the Indiana Rules of Trial Procedure, file an answer to the complaint and may appear at the hearing on the action.

(e) If, at the end of the time allotted for an answer, there is no answer on file, the court, upon motion, shall enter judgment in favor of the state and shall order the property disposed of in accordance with section 4 [Ind. Code § 34-24-1-4] of this chapter.

34-24-1-4. Burden of proof — Judgment.

(a) At the hearing, the prosecuting attorney must show by a preponderance of the evidence that the property was within the definition of property subject to seizure under section 1 [Ind. Code § 34-24-1-1] of this chapter. If the property seized was a vehicle, the prosecuting attorney must also show by a preponderance of the evidence that a person who has an ownership interest of record in the bureau of motor vehicles knew or had reason to know that the vehicle was being used in the commission of the offense.

(b) If the prosecuting attorney fails to meet the burden of proof, the court shall order the property released to the owner, unless the owner's possession of the property is illegal. If property is released to the owner under this subsection, the owner is not subject to or responsible for any charges for storage of the property or other expenses incurred in the preservation of the property.

(c) If the court enters judgment in favor of the state, the court, subject to section 5 [Ind. Code § 34-24-1-5] of this chapter, shall order distribution of the property in accordance with subsection (d). The court's order may permit the law enforcement agency to use the property for a period not to exceed three (3) years. However, the order must require that, after the period specified by the court, the law enforcement agency shall deliver the property to the county sheriff for public sale.

(d) If the court enters judgment in favor of the state, the court shall, subject to section 5 of this chapter order that:

(1)the property, if it is not money or real property, be sold under section 6 [Ind. Code § 34-24-1-6] of this chapter, by the sheriff of the county in which the property was seized, and if the property is a vehicle, this sale must occur after any period of use specified in subsection (c);
(2)the property, if it is real property, be sold in the same manner as real property is sold on execution under Ind. Code § 34-55-6; and
(3)the proceeds of the sale or the money be distributed as follows:

(A)To pay attorney's fees, if outside counsel is employed under section 8 [Ind. Code § 34-24-1-8] of this chapter.
(B)After payment of attorney's fees under clause (A), one third (1/3) of the remaining amount shall be deposited into the forfeiture fund established by the prosecuting attorney to offset expenses incurred in connection with the investigation and prosecution of the action.
(C)Except as provided in clause (D), after distribution of the proceeds described in clauses (A) and (B), if applicable, eighty-five percent (85%) of the remaining proceeds shall be deposited in the:

(i)general fund of the state;
(ii)general fund of the unit that employed the law enforcement officers that seized the property; or
(iii)county law enforcement fund established for the support of the drug task force; as determined by the court, to offset expenses incurred in the investigation of the acts giving rise to the action.

(D)After distribution of the proceeds described in clauses (A) and (B), if applicable, eighty-five percent (85%) of the remaining proceeds shall be deposited in the general fund of a unit if the property was seized by a local law enforcement agency of the unit for an offense, an attempted offense, or a conspiracy to commit an offense under Ind. Code § 35-47 as part of or in furtherance of an act of terrorism. The court shall order that the proceeds remaining after the distribution of funds to offset expenses described in subdivision (3) be forfeited and transferred to the treasurer of state for deposit in the common school fund.

(e)If property that is seized under this chapter (or Ind. Code § 34-4-30.1-4 before its repeal) is transferred:

(1)after its seizure, but before an action is filed under section 3 [Ind. Code § 34-24-1-3] of this chapter (or Ind. Code § 34-4-30.1-3 before its repeal); or

(2)when an action filed under section 3 of this chapter (or Ind. Code § 34-4-30.1-3 before its repeal) is pending; the person to whom the property is transferred must establish an ownership interest of record as a bona fide purchaser for value. A person is a bona fide purchaser for value under this section if the person, at the time of the transfer, did not have reasonable cause to believe that the property was subject to forfeiture under this chapter.

(f)If the property seized was an unlawful telecommunications device (as defined in Ind. Code § 35-45-

13-6) or plans, instructions, or publications used to commit an offense under Ind. Code § 35-45-13, the court may order the sheriff of the county in which the person was convicted of an offense under Ind. Code § 35-45-13 to destroy as contraband or to otherwise lawfully dispose of the property.

34-24-1-4.5. Prosecuting attorney's reports.

(a) After a prosecuting attorney files a forfeiture action, the prosecuting attorney shall report the following to the Indiana prosecuting attorneys council:

(1) The date the property was seized.

(2) Whether the property seized was cash, a vehicle, real property, or other personal property.

(3) Whether the forfeiture was filed in state court or through federal adoptive seizure. This subsection applies even if the prosecuting attorney has retained an attorney to bring the forfeiture action.

(b) After a court enters a judgment in favor of the state or a unit under section 4 [Ind. Code § 34-24-1-4] of this chapter, the prosecuting attorney shall report the following to the Indiana prosecuting attorneys council:

(1) The amount of money or property that is the subject of the judgment.

(2) The law enforcement agency to which the money or property is ordered to be transferred.

(3) Whether the forfeiture was contested.

(4) Whether an innocent owner made a claim to the property.

(5) Whether the final disposition of the property resulted in the property being returned, destroyed, forfeited, retained, or distributed by settlement.

(6) The date of the final disposition. This subsection applies even if the prosecuting attorney has retained an attorney to bring an action under this chapter.

(c) After a court, upon motion of the prosecuting attorney under Ind. Code § 35-33-5-5(j), orders property transferred to a federal authority for disposition under 18 U.S.C. 981(e), 19 U.S.C. 1616a, or 21 U.S.C. 881(e), and any related regulations adopted by the United States Department of Justice, the prosecuting attorney shall report to the Indiana prosecuting attorneys council the amount of money or property transferred. This subsection applies even if the prosecuting attorney has retained an attorney to bring an action under this chapter.

(d)A report made to the Indiana prosecuting attorneys council under this section must be in a format approved by the prosecuting attorneys council. A prosecuting attorney with no forfeitures to report shall file a report with the Indiana prosecuting attorneys council.

34-24-1-5. Secured interests — Co-owner of property.

(a) If:

(1)the court has entered judgment in favor of the state, and a unit (if appropriate) concerning property that is subject to seizure under this chapter; and

(2)a person:

(A)holding a valid lien, mortgage, security interest, or interest under a conditional sales contract; or

(B)who is a co-owner of the property;

did not know of the illegal use; the court shall determine whether the secured interest or the co-owner's interest is equal to or in excess of the appraised value of the property.

(b) Appraised value is to be determined as of the date of judgment on a wholesale basis by:

(1)agreement between the secured party or the co-owner and the prosecuting attorney; or

(2)the county assessor for the county in which the action is brought.

(c) If the amount:

(1)due to the secured party; or

(2)of the co-owner's interest; is equal to or greater than the appraised value of the property, the court shall order the property released to the secured party or the co-owner.

(d) If the amount:

(1)due the secured party; or

(2)of the co-owner's interest; is less than the appraised value of the property, the holder of the interest or the co-owner may pay into the court an amount equal to the owner's equity, which shall

be the difference between the appraised value and the amount of the lien, mortgage, security interest, interest under a conditional sales contract, or co-owner's interest. Upon such payment, the state or unit, or both, shall relinquish all claims to the property, and the court shall order the payment deposited as provided in section 4(d) [Ind. Code § 34-24-1-4(d)] of this chapter.

(e)If the seized property is a vehicle and if the security holder or the co-owner elects not to make payment as stated in subsection (d), the vehicle shall be disposed of in accordance with section 4(c) [Ind. Code § 34-24-1-4(c)] of this chapter.

34-24-1-6. Public sale.

(a) Where disposition of property is to be made at a public sale, notice of sale shall be published in accordance with Ind. Code § 34-55-6.
(b) When property is sold at a public sale under this chapter, the proceeds shall be distributed in the following order:
(1) First, to the sheriff of the county for all expenditures made or incurred in connection with the sale, including storage, transportation, and necessary repair.
(2) Second, to any person:
(A)holding a valid lien, mortgage, land contract, or interest under a conditional sales contract or the holder of other such interest; or
(B)who is a co-owner and has an ownership interest; up to the amount of that person's interest as determined by the court.
(3) The remainder, if any, shall be transferred by the sheriff to the appropriate fund as ordered by the court in section 4(d) [Ind. Code § 34-24-1-4(d)] of this chapter.

34-24-1-7. Filing of court order — Vehicle — Real property.

(a) If the property seized was a vehicle, a copy of the court's order under this chapter (or Ind. Code § 34-4-30.1-7 before its repeal):
(1)shall be filed with the department of motor vehicles or other appropriate agency; and
(2)constitutes authority for the issuance of clear title to that vehicle in the name of the person or purchaser to whom the order authorizes delivery.
(b) If the property seized was real property, a copy of the court's order under this chapter (or Ind. Code § 34-4-30.1-7 before its repeal):
(1)shall be filed with the county recorder; and
(2)constitutes authority for:
(A)the sale of the property in the manner provided under Ind. Code § 34-55-6; and
(B)the issuance of clear title to a bona fide purchaser for value who acquires the real property at the sale.

34-24-1-8. Attorney retained to assist prosecuting attorney.

(a)A prosecuting attorney may retain an attorney to bring an action under this chapter only in accordance with this section.
(b) The compensation agreement between a prosecuting attorney and an attorney retained to bring an action under this chapter must be:
(1)in writing; and
(2)approved by the attorney general for form and legality.
(c) An attorney retained under this section must be admitted to the practice of law in Indiana. The attorney retained may not serve as a deputy prosecuting attorney in any county.
(d)A prosecuting attorney or deputy prosecuting attorney who conducts a forfeiture action within the scope of the attorney's duties as a prosecuting attorney or deputy prosecuting attorney in the prosecuting attorney's office may not receive a contingency fee.
(e)A compensation agreement under this section must be a contingency fee agreement limited as follows:
(1) The contingency fee may not exceed thirty-three and one-third percent (33 1/3%) of the first ten thousand dollars ($10,000) of proceeds or money obtained under a settlement or judgment.
(2) The contingency fee may not exceed twenty percent (20%) of the part of the proceeds or money obtained under a settlement or judgment that is more than ten

thousand dollars ($10,000) and less than one hundred thousand dollars ($100,000).

(3)The contingency fee may not exceed fifteen percent (15%) of the part of the proceeds or money obtained under a settlement or judgment that is one hundred thousand dollars ($100,000) or more.

(4)The contingency fee agreement may establish a minimum fee that does not exceed one hundred dollars ($100).

A court may authorize a compensation agreement between the prosecuting attorney and an attorney retained to bring an action that exceeds the limits described in this subsection if the court finds that the issues presented in the particular forfeiture action are unusually complex or time consuming as compared with other forfeiture actions.

34-24-1-9. Transfer to federal authority — Disposition and use of money.

(a) Upon motion of a prosecuting attorney under Ind. Code § 35-33-5-5(j), property seized under this chapter must be transferred, subject to the perfected liens or other security interests of any person in the property, to the appropriate federal authority for disposition under 18 U.S.C. § 981(e), 19 U.S.C. § 1616a, or 21 U.S.C. § 881(e) and any related regulations adopted by the United States Department of Justice.

(b) Money received by a law enforcement agency as a result of a forfeiture under 18 U.S.C. § 981(e), 19 U.S.C. § 1616a, or 21 U.S.C. § 881(e) and any related regulations adopted by the United States Department of Justice must be deposited into a nonreverting fund and may be expended only with the approval of:

(1)the executive (as defined in Ind. Code § 36-1-2-5), if the money is received by a local law enforcement agency; or

(2)the governor, if the money is received by a law enforcement agency in the executive branch.

The money received under this subsection must be used solely for the benefit of any agency directly participating in the seizure or forfeiture for purposes consistent with federal laws and regulations.